

EMPLOYEE-MANAGEMENT RELATIONS COMMISSION

[22 CFR Ch. VIII]

[Docket No. SD-100]

EMPLOYEE-MANAGEMENT RELATIONS

Notice of Proposed Rule Making

Pursuant to sections 5(d) and 12(b) of Executive Order 11633 (36 F.R. 24901), notice is hereby given that the Employee-Management Relations Commission proposes to amend Title 22 of the Code of Federal Regulations by adding a new chapter as set forth below, in order to implement the duties delegated to the Employee-Management Relations Commission under the order. This chapter prescribes substance and procedures relating to unfair practices, representational matters, consultation matters, and standards of conduct for organizations.

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rule making to the Employee-Management Relations Commission, Board of the Foreign Service, Washington, D.C. 20530, within thirty (30) days after publication of this notice in the Federal Register. All written materials or suggestions submitted in response to this notice of proposed rule making will be available for public inspection at the public reading room, Department of State, 2201 C Street NW., Washington, DC, during regular business hours.

Chapter VIII—Employee-Management Relations Commission

1. The table of contents of Chapter VIII would read as follows:

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- 802 Representation proceedings.
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PART 801—GENERAL

Subpart A—Purpose and Scope

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- 801.23 Showing of interest.

AUTHORITY: The provisions of this Part 801 issued under secs. 5, 12, E.O. 11636, 36 F.R. 24901.

Subpart A—Purpose and Scope

§ 801.1 Purpose and scope.

The regulations contained in this chapter prescribe procedures and basic principles which the Employee-Management Relations Commission shall utilize in:

- (a) Deciding questions relating to the eligibility of organizations for recognition under the order;
- (b) Supervising elections to determine whether an organization is the choice of a majority of the eligible voters in a foreign affairs agency as their exclusive representative, and certifying the results;
- (c) Effectuating the standards of conduct required for organizations by section 12 of the order;
- (d) Deciding complaints of alleged unfair practices, and alleged violations of the standards of conduct for organizations;
- (e) Deciding questions of whether an obligation to consult exists under section 8 of the order with respect to particular issues.

Subpart B—Meanings of Terms as Used in This Chapter

§ 801.10 Order.

"Order" means Executive Order 11636, entitled "Employee Management Relations in the Foreign Service of the United States."

§ 801.11 Employee.

"Employee" has the meaning set forth in section 2 of the order, but does not include any management official or confidential employee as defined in section 2 of the order, unless otherwise specified.

§ 801.12 Foreign affairs agency, organization, Board, Secretary, Commission.

"Foreign affairs agency," "organization," "Board," "Secretary," and "Commission" have the meanings set forth in section 2 of the order.

§ 801.13 Recognition, unfair practices.

"Recognition" and "unfair practices" have the meanings as set forth in sections 7 and 13, respectively, of the order.

§ 801.14 Standards of conduct for organizations.

"Standards of conduct for organizations" shall have the meaning as set forth in section 12 of the order, as amplified in Part 804 of this chapter.

§ 801.15 Director.

"Director" means the Director of the Office of Labor-Management and Welfare-Pension Reports.

§ 801.16 Hearing Officer.

"Hearing Officer" means the individual designated by the Commission to conduct a hearing involving a question concerning representation matters as may be assigned.

§ 801.17 Hearing Examiner.

"Hearing Examiner" means the Chief Hearing Examiner or an individual designated by the Chief Hearing Examiner to conduct a hearing in cases under

sections 12 and 13 of the order and such other matters as may be assigned.

§ 801.18 Chief Hearing Examiner.

"Chief Hearing Examiner" means the Chief Hearing Examiner, Department of Labor, Washington, D.C. 20210.

§ 801.19 Party.

"Party" means any person, employee, group of employees, organization, or foreign affairs agency: (a) Filing a complaint, petition, request, or application; (b) named in a complaint, petition, request, or application; or (c) whose intervention in a proceeding has been permitted or directed by the Commission, Director, Hearing Officer, Chief Hearing Examiner, or Hearing Examiner, as the case may be.

§ 801.20 Intervenor.

"Intervenor" means a party in a proceeding whose intervention has been permitted or directed by the Commission, Director, Hearing Officer, Chief Hearing Examiner, or Hearing Examiner, as the case may be.

§ 801.21 Certification.

"Certification" means the determination by the Commission, of the results of an election held under the order and the regulations in this chapter.

§ 801.22 Secret ballot.

"Secret ballot" means the expression by ballot, voting machine or otherwise, but in no event by proxy of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed, except in that instance in which any determinative challenged ballot is opened or where a unanimous ballot discloses the intent of all voters.

§ 801.23 Showing of interest.

"Showing of interest" means employees' signed and dated authorization cards or petitions authorizing an organization to represent them for purposes of exclusive recognition; executed allotment of dues forms; current certification; employees' signed and dated petitions or cards indicating that they no longer desire to be represented for the purposes of exclusive recognition by the currently certified organization or other evidence approved by the Commission.

PART 802—REPRESENTATION PROCEEDINGS

- Sec. 802.1 Who may file petitions.
- 802.2 Contents of petition; filing and service of petition; challenges to petition.
- 802.3 Timeliness of petition.
- 802.4 Effect of certification.
- 802.5 Investigation and notice of petition.
- 802.6 Intervention.
- 802.7 Withdrawal, dismissal, or deferral of petitions; consolidation of cases; denial of intervention.
- 802.8 Agreement for consent election.
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802.16	Transfer of case to Commission; contents of record.
802.17	Decision.
802.18	Election procedure.
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802.21	Certifications; objections to election; determination on objections and challenged ballots.
802.22	Runoff elections.
802.23	Inconclusive elections.

Authority: The provisions of this Part 802 issued under sec. 5, E.O. 11636, 36 F.R. 24901.

§ 802.1 Who may file petitions.

(a) A petition for exclusive recognition may be filed by an organization requesting an election to determine whether it should be recognized as the exclusive representative of employees of a foreign affairs agency or should replace another organization as the exclusive representative of such employees.

(b) A petition for an election to determine if an organization should cease to be the exclusive representative because it does not represent a majority of employees of a foreign affairs agency may be filed by a foreign affairs agency or by any employee(s) or any individual acting on their behalf.

§ 802.2 Contents of petition, filing and service of petition; challenges to petition.

(a) *Petition for exclusive recognition.* A petition by an organization for exclusive recognition shall contain the following:

(1) The name of the foreign affairs agency, its address, and the person to contact, title, and telephone number, if known.

(2) Name, address, and telephone number of the certified representative, if any, and the date of its certification, if known to the petitioner;

(3) Names, addresses, and telephone numbers of any other interested organizations, if known to the petitioner;

(4) Name and affiliation, if any, of the petitioner and its address and telephone number;

(5) A statement that the petitioner has submitted to the Commission a current roster of its officers and representatives, a copy of its constitution and by-laws and a statement of its objectives;

(6) A declaration by the person signing the petition, under the penalties of the Criminal Code (18 U.S.C. 1001) that its contents are true and correct to the best of his knowledge and belief;

(7) The signature of the petitioner's representative, including title and telephone number;

(8) The petition shall be accompanied by a showing of interest of not less than twenty-five (25) percent of the employees of a foreign affairs agency and an alphabetical list of names constituting such showing;

(9) A statement that the petitioner is in full compliance with the requirements

of the order and the regulations under this chapter.

(b) *Petition for an election to determine if an organization should cease to be the exclusive representative.* (1) A petition by a foreign affairs agency shall contain the information set forth in paragraph (a) of this section, except paragraph (a) (5), (8), and (9) of this section, and a statement that the foreign affairs agency has a good faith doubt that the currently certified organization represents a majority of its employees. Such a statement must contain a detailed explanation of the reasons supporting the good faith doubt;

(2) A petition by employees or an individual acting on behalf of employees shall contain the information set forth in paragraph (a) of this section, except paragraph (a) (5), (8), and (9) of this section, and it shall be accompanied by a showing of interest of not less than twenty-five (25) percent of the employees indicating that the employees of the foreign affairs agency no longer desire to be represented for the purpose of exclusive recognition by the currently certified organization and an alphabetical list of names constituting such showing.

(c) *Filing and service of petition and copies.* (1) An original and four copies of a petition shall be filed with the Commission.

(2) The petitioner shall supply with its petition two (2) copies of a statement of any other relevant facts and of all correspondence relating to the question concerning representation.

(3) Simultaneously with the filing of a petition, copies of the petition together with the attachments referred to in subparagraph (2) of this paragraph shall be served by the petitioner on all known interested parties, and a written statement of such services shall be filed with the Commission. The showing of interest submitted with the petition shall not be furnished to the foreign affairs agency or to any of the organizations listed in the petition.

(d) *Adequacy and validity of showing of interest.* The Commission shall determine the adequacy of the showing of interest administratively, and such decision shall be final and not subject to collateral attack at a representation hearing. Any party challenging the validity of showing of interest of the petitioner or of an intervenor must file its challenge with the Commission, with respect to the petitioner, within fifteen (15) days after the initial date of posting and dispatch of the notice of petition as provided in § 802.5(b) and with respect to any intervenor, within fifteen (15) days of service of a copy of the request for intervention, and support the challenge with evidence including signed statements of employees and any other written evidence. The Commission shall investigate the challenge and take such action as it deems appropriate.

(e) *Challenge to status of an organization.* Any party challenging the status of an organization under the order must file its challenge with the Commission and support the challenge with evidence.

With respect to the petitioner, such a challenge must be filed within fifteen (15) days after the initial date of posting and dispatch of the notice of petition as provided in § 802.5(b) and with respect to an intervenor within fifteen (15) days of service of a copy of the request for intervention. The Commission shall investigate the challenge and take such action as it deems appropriate.

§ 802.3 Timeliness of petition.

(a) When there is no certified exclusive representative of the employees, a petition will be considered timely filed provided the petition is not for a foreign affairs agency in which a valid election has been held within the preceding twelve (12) month period.

(b) A petition for exclusive recognition or other election petition will not be considered timely if filed within two (2) years after a valid certification has come into effect unless unusual circumstances exist which will substantially affect the voting unit or the majority representation.

(c) A petitioner who withdraws a petition after the issuance of a notice of hearing and before the close of the hearing, or after the approval of an agreement for a consent election, shall be barred from filing another petition for six (6) months, unless a withdrawal request has been received by the Commission not later than three (3) days before the date of the hearing.

§ 802.4 Effect of certification.

When a secret ballot election has resulted in the certification of an exclusive representative for the eligible employees in a foreign affairs agency, such certification shall remain valid for a period of not less than 2 years, unless such certification is earlier revoked for proper cause by the Commission. After the expiration of 2 years following the effective date of a certification, such certification shall remain in effect until (a) successfully challenged by a timely petition and election, or (b) revoked for proper cause by the Commission.

§ 802.5 Investigation and notice of petition.

(a) Upon the filing of a petition the Commission shall make such investigation as it deems necessary.

(b) Upon the request of the Commission, after the filing of a petition, the foreign affairs agency shall post at its headquarters copies of a notice to all employees in places where notices are normally posted affecting the employees of the agency. In addition, the foreign affairs agency shall, simultaneously with the date of posting, dispatch telegraphic notice of the petition to Foreign Service posts abroad for the information of the agency's employees at such posts.

(c) Such notice shall set forth: (1) The name of the petitioner and (2) a statement that all interested parties are to advise the Commission in writing of their interest within fifteen (15) days from the date of initial posting and dispatch of such notice.

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(d) The posted notice shall remain posted for a period of fifteen (15) days. The notice shall be posted conspicuously and shall not be covered by other material, altered, or defaced.

(e) The foreign affairs agency shall furnish the Commission and all known interested parties with the following: (1) Name, address, and telephone number of any organization known to represent the employees; (2) a copy of all relevant correspondence; (3) a copy of a current certification, if any, covering the employees of the foreign affairs agency; (4) a current alphabetized list of employees, their rank and positions of assignment; and (5) a separate, current alphabetized list of management officials and confidential employees, their rank and positions of assignment.

(f) Within twenty (20) days following the receipt of a copy of the petition, unless an extension of time has been granted by the Commission, the foreign affairs agency shall file a response thereto with the Commission raising any matter which is relevant to the petition. A copy of such response shall be served simultaneously on the parties and a statement of such service shall be filed with the Commission.

(g) The Commission shall take appropriate measures which, among other things, may consist of one of the following: (1) The approval of a withdrawal request; (2) the dismissal of the petition; (3) direction of an election; or (4) the issuance of a notice of hearing.

§ 802.6 Intervention.

(a) Subject to the provisions of paragraph (b) of this section and § 802.7(b), an organization will be permitted to intervene as a matter of right in any proceeding pursuant to this part if it has submitted a showing of interest of five (5) percent or more of the employees of the foreign affairs agency together with an alphabetical list of names constituting such showing. Intervention by any other party which does not submit such a showing of interest shall be at the discretion of the Commission.

(b) No organization may participate in any representation proceeding unless it has notified the Commission in writing, accompanied by its showing of interest as specified in paragraph (a) of this section of its desire to intervene within fifteen (15) days after the initial posting and despatch of the notice of petition as provided in § 802.5 (b) unless good cause is shown for extending the period. Simultaneously with the filing of a request for intervention, copies of such request, excluding the showing of interest, shall be served on all known interested parties, and a written statement of such service shall be filed with the Commission.

(c) Any organization intervening must supply a statement to the Commission that it is in full compliance with the order and these regulations and that it has submitted to the foreign affairs agency a current roster of its officers and representatives, a copy of its constitution and bylaws and a statement of its objectives.

§ 802.7 Withdrawal, dismissal, or deferral of petitions; consolidation of cases; denial of intervention.

(a) If the Commission determines after an investigation that the petition has not been filed timely, the petitioner has not made a sufficient showing of interest, the petition is not otherwise actionable, or an intervention is not appropriate, it may request the petitioner or intervenor to withdraw the petition or the intervention or, in the absence of such withdrawal within a reasonable period of time, it may dismiss the petition or deny the request for intervention.

(b) If the Commission determines, after investigation, that a valid issue has been raised by a challenge under § 802.2 (d) or (e), it may take such action as it deems appropriate including a request to the petitioner to withdraw the petition, dismissal of the petition, denial of the request for intervention, deferral of action upon the petition or request for intervention until such time as those issues have been resolved pursuant to this part, or consolidation of such issues with the representation matter for resolution of all issues.

(c) If the Commission dismisses the petition or denies the request for intervention, it shall furnish the petitioner or the party requesting intervention with a written statement of the grounds for the dismissal or the denial, sending a copy of such statement to the foreign affairs agency, and to any other parties as appropriate.

§ 802.8 Agreement for consent election.

(a) Subsequent to the filing of a petition and after expiration of the fifteen (15) day posting period of the notice of petition as provided in § 802.5(d), the foreign affairs agency, petitioner and any intervenors who have complied with the requirements set forth in § 802.6, and paragraph (d) of this section may agree that a secret ballot election shall be conducted and such agreement in a form approved by the Commission, shall be filed with the Commission. Any qualified intervenor who refuses to sign an agreement for a consent election may express his objections to the agreement in writing to the Commission. The Commission, after careful consideration of the agreement and of such objections, if any, may approve the agreement or take such other action as it deems appropriate. If the Commission approves the agreement, the election shall be conducted by the foreign affairs agency, under the supervision of the Commission in accordance with § 802.13 to determine whether the employees desire to be represented for purposes of exclusive recognition by any or none of the organizations involved.

(b) The parties shall agree on the eligibility period for employee participation in the election, the dates of the election, the designations on the ballot and other related election procedures.

(c) In the event that the parties cannot agree on the matters contained in paragraph (b) of this section, the Commission shall decide these matters.

(d) All parties desiring to participate in an election being conducted pursuant to this section, or § 802.17, including intervening organizations which have met the requirements of § 802.6, must sign an agreement providing for such an election in a form prescribed by the Commission.

§ 802.9 Notice of hearing.

The Commission may issue a notice of hearing to resolve any questions relating to the representation matter. A notice of hearing providing for at least ten (10) days notice, except in unusual circumstances, shall be served on all interested parties and shall include:

(a) A statement of the time, place, and nature of the hearing;

(b) The name of the foreign affairs agency, petitioner and intervenors, if any;

(c) A statement of the authority and jurisdiction under which the hearing is to be held.

§ 802.10 Conduct of hearing.

(a) The Commission, in its sole discretion and on its own motion, may sit en banc and conduct the hearing. Where the Commission hears the case sitting en banc, it will issue a decision on the record in the case after the close of the hearing. The Commission in such cases will have all the powers of a Hearing Officer and will advise the parties (notwithstanding § 802.15) whether briefs will be permitted. If the Commission does not elect to sit en banc, it shall designate a Hearing Officer.

(b) Hearings shall be open to the public unless otherwise ordered by the Hearing Officer for good cause, stated in writing, and made a part of the record. When requested to do so by the head of the foreign affairs agency, the Commission shall direct that the hearing be conducted as a closed hearing, in whole or in part, in order to prevent the disclosure of information that would be injurious to the national security or foreign policy. At any time another Hearing Officer may be substituted for the Hearing Officer previously presiding. It shall be the duty of the Hearing Officer to inquire fully into all matters in issue and the Hearing Officer shall obtain a full and complete record upon which the Commission can make an appropriate decision.

(c) An official reporter shall make the only official transcript of such proceedings. Copies of the official transcript will not be provided to the parties but may be purchased by arrangement with the official reporter or arrangements may be made with the Commission to examine the transcript during normal working hours.

(d) Hearings under this section are considered investigatory and not adversary. Their purpose is to develop a full and complete factual record. The rules of relevancy and materiality are paramount; there are no burdens of proof and the technical rules of evidence do not apply.

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§ 802.11 Motions.

(a) All motions shall be in writing, or, if made at the hearing may be stated orally on the record and shall state briefly the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof simultaneously shall be served on the other parties to the proceedings. Motions made prior to the hearing shall be filed with the Commission, and motions made during the hearing shall be filed with the Hearing Officer. After the transfer of the case to the Commission, except as otherwise provided, all motions shall be filed with the Commission. Other parties may file responses to such motions within five (5) days of service. The Commission may rule upon all motions filed with it causing a copy of said ruling to be served on the parties, or it may refer the motion to the Hearing Officer. The Hearing Officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the record is considered by the Commission.

(b) Motions to intervene will not be entertained by the Hearing Officer.

(c) All motions, rulings and orders shall become a part of the record. Rulings by the Hearing Officer shall be considered by the Commission when the case is transferred to it for decision.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

§ 802.12 Rights of the parties.

(a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party shall have power to examine and cross-examine witnesses and to introduce into the record documentary and other evidence. Two (2) copies of documentary evidence shall be submitted and a copy furnished simultaneously to the other parties. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

§ 802.13 Duties and powers of the Hearing Officer.

It shall be the duty of the Hearing Officer to inquire fully into the facts as they relate to the matters presented. With respect to cases assigned to the Hearing Officer between the time he or she is designated and the transfer of the case to the Commission, the Hearing Officer shall have the authority to:

- (a) Grant requests for appearance of witnesses or production of records;
- (b) Rule upon offers of proof and receive relevant evidence;
- (c) Take or cause depositions to be taken whenever the ends of justice would be served thereby;

(d) Limit lines of questioning or testimony which are immaterial, irrelevant, customarily privileged, or unduly repetitious;

(e) Regulate the course of the hearing and, if appropriate, exclude from the hearing persons who engage in misconduct;

(f) Strike all related testimony of witnesses refusing to answer any questions ruled to be proper;

(g) Hold conferences for the settlement or simplification of the issues by consent of the parties or upon his or her own motion;

(h) Dispose of procedural requests, motions, or similar matters which shall be made part of the record of the proceeding, including motions referred to the Hearing Officer by the Commission and motions to amend petitions;

(i) Examine and cross-examine witnesses and to introduce into the record documentary or other evidence;

(j) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(k) Continue the hearing from day-to-day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice;

(l) Correct or approve proposed corrections of the official transcript, when deemed necessary;

(m) Take any other action necessary under the foregoing and not prohibited by these regulations.

§ 802.14 Objections to conduct of hearing.

Any objection to the introduction of evidence may be stated orally or in writing and shall be accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing. Automatic exception will be allowed to all adverse rulings.

§ 802.15 Filing of briefs.

(a) Any party desiring to file a brief with the Commission shall file the original and two (2) copies within fourteen (14) days after the close of the hearing; *Provided, however,* That prior to the close of the hearing and for good cause, the Hearing Officer may allow time not to exceed fourteen (14) additional days for the filing of briefs with the Commission. Copies thereof shall be served simultaneously on all other parties to the proceeding. No reply brief may be filed except by special permission of the Commission.

(b) Requests for additional time in which to file a brief under authority of this section not addressed to the Hearing Officer during the hearing shall be made to the Commission in writing, and copies thereof shall be served simultaneously on the other parties, and a statement of such service shall be filed with the Commission. Requests for extension of time under this subsection shall be in writing and received not later than three (3) days before the date such briefs are due.

§ 802.16 Transfer of case to the Commission; contents of record.

Upon the close of the hearing the case is transferred automatically to the Commission. The record of the proceeding shall include the petition, notice of hearing, service sheet, motions, rulings, orders, official transcript of the hearing with any corrections thereto, stipulations, objections, depositions, exhibits, documentary evidence, and any briefs or other documents submitted by the parties.

§ 802.17 Decision.

The Commission will issue a decision directing an election or dismissing the petition, or making other disposition of the matters before it.

§ 802.18 Election procedure.

This section governs all elections conducted under the supervision of the Commission, pursuant to § 802.3 or § 802.17.

(a) Appropriate notices of election shall be posted by the foreign affairs agency. Such notices shall set forth the details and procedures for the election, the eligibility period, the date(s) of the election, and shall contain a sample ballot.

(b) The reproduction of any document purporting to be a copy of the official ballot, other than one completely unaltered in form and content and clearly marked "sample" on its face, which suggests either directly or indirectly to employees that the Commission endorses a particular choice, may constitute grounds for setting aside an election upon objections properly filed.

(c) All elections shall be by secret ballot. An exclusive representative shall be chosen by a majority of the valid ballots cast.

(d) Whenever two or more organizations are included as choices in an election, any intervening organization may request, in writing, the Commission to remove its name from the ballot. The request must be received not later than ten (10) days after the decision and direction of the election or the Commission's notification of approval of agreement for an election. Such request shall be subject to the approval of the Commission, whose decision shall be final; *Provided, however,* That in a proceeding involving a petition filed under § 802.2 (b) an organization currently certified may not have its name removed from the ballot without giving the aforementioned notice in writing to all parties and the Commission, disclaiming any representation interest among the employees.

§ 802.19 Challenged ballots.

A representative of any organization on the ballot, of the foreign affairs agency, or of the Commission may challenge, for good cause, the eligibility of any person to vote in the election. The ballots of such challenged persons shall be impounded.

§ 802.20 Tally of ballots.

Upon the conclusion of the election, the Commission shall furnish to the parties a tally of ballots.

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§ 802.21 Certifications; objections to election; determination on objections and challenged ballots.

(a) The Commission shall issue to the party a certification of the results of the election, or a certification of representative, where appropriate: *Provided*, That if objections are filed within the time limit set forth below; the challenged ballots are insufficient in number to affect the results of the election; and no runoff or rerun election is to be held.

(b) Within five (5) days after the tally of ballots has been furnished, or proffered when service has been refused, any party may file with the Commission an original and four (4) copies of objections to the procedural conduct of the election, or to conduct which may have improperly affected the results of the election, supported by a clear and concise statement of the reason therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Within ten (10) days of the filing of the objections, unless an extension of time has been granted by the Commission, the objecting party shall furnish the Commission with evidence, which may include but shall not be limited to signed statements, documentary evidence, and other materials supporting the objections. The objecting party shall bear the burden of proof at all stages of the proceedings, regarding all matters alleged in its objections. Simultaneously with the filing of such objections, together with the evidence in support thereof, copies of such objections and of the supporting evidence shall be served on the other parties by the party filing them, and a statement of such service shall be filed with the Commission.

(c) If objections are filed, or if the challenged ballots are sufficient in number to affect the results of the election, the Commission shall cause to be investigated the objections or challenges, or both.

(d) When the Commission determines that no relevant issue of fact exists, it shall find whether improper conduct occurred of such a nature as to warrant the setting aside of the election and, if so, shall set aside the election, or (2) shall rule on determinative challenges to ballots, if any, or both. The Commission shall serve simultaneously any such findings upon all parties to the proceeding and shall state therein any additional pertinent matters such as its decision to rerun the election or count ballots at a specified date, time, and place, and to issue a revised tally of ballots.

Where it appears to the Commission that the objections or challenged ballots raise any relevant question of fact which may have affected the results of the election, the Commission shall give notice of hearing specifying the issues and it will conduct the hearing in accordance with § 803.10(a) of this chapter or that a Hearing Examiner, designated by the Chief Hearing Examiner, will take evidence, make factual findings, and recommendations with respect to the objections and/or challenged

ballots, and report these findings and recommendations to the Commission and the parties. Such proceedings shall be conducted in accordance with §§ 803.10 through 803.24 of this chapter.

(f) The Commission shall decide whether to adopt or modify the Hearing Examiner's recommendations. In accord with the Commission's final determinations, it shall issue a certification of the results of the election, certification of representative, or a decision setting aside the election or directing the opening and counting of challenged ballots, whichever is appropriate.

§ 802.22 Runoff elections.

(a) The foreign affairs agency shall conduct a runoff election under supervision of the Commission when an election in which the ballot provided for not less than three (3) choices (i.e., at least two representatives and "neither" or "none") results in no choice receiving a majority of the valid ballots cast, and any objections which had been filed have been disposed of, and any challenged ballots have been disposed of or are not sufficient in number to affect the results of the election, as provided herein. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the original election and who also are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

§ 802.23 Inconclusive elections.

(a) An inconclusive election is one in which none of the choices on the ballot has received a majority of the valid ballots cast and § 803.22 of this chapter is not applicable. If there are no challenged ballots that would affect the results of the election, the Commission may declare the election a nullity and may order another election, providing for a selection from among the choices afforded in the previous ballot in the following situations:

(1) The ballot provided for a choice among two or more representatives and "neither" or "none," and the votes are equally divided among the several choices;

(2) The number of ballots cast for one choice in an election is equal to the number cast for another choice but less than the number cast for the third choice; or

(3) The runoff ballot provides for a choice between two representatives and the votes are equally divided.

(b) Only one further election pursuant to this section may be held.

PART 803—UNFAIR PRACTICE PROCEEDINGS

- Sec.
803.1 Who may file complaints.
803.2 Action to be taken before filing a complaint with the Commission.
803.3 Contents of the complaint and supporting documents.
803.4

- Sec.
803.5 Investigation of the complaint; stipulation of facts.
803.6 Preliminary action by the Commission.
803.7 Withdrawal or dismissal of complaint.
803.8 Notice of hearing.
803.9 Contents of the notice of hearing; attachments.
803.10 Conduct of hearing.
803.11 Intervention.
803.12 Rights of parties.
803.13 Rules of evidence.
803.14 Burden of proof.
803.15 Duties and powers of the Hearing Examiner.
803.16 Unavailability of Hearing Examiners.
803.17 Objection to conduct of hearing.
803.18 Motions before or after a hearing.
803.19 Waiver of objections.
803.20 Oral argument at the hearing.
803.21 Filing of brief.
803.22 Submission of the Hearing Examiner's report and recommendations to the Commission; exceptions.
803.23 Contents of exceptions to Hearing Examiner's report and recommendations.
803.24 Briefs in support of exceptions.
803.25 Action by the Commission.
803.26 Compliance with decisions and orders of the Commission.

AUTHORITY: The provisions of this Part 803 issued under sec. 5 E.O. 11636, 30 F.R. 24901.

§ 803.1 Who may file complaints.

A complaint that a foreign affairs agency or an organization has engaged in any act prohibited under section 13 of the order or has failed to take any action required by the order, may be filed by an employee, a foreign affairs agency, or an organization.

§ 803.2 Action to be taken before filing a complaint with the Commission.

(a) Any charge of an alleged unfair practice must be in writing and shall be filed directly with the party or parties against whom the charge is directed, hereinafter referred to as the respondent(s), within six (6) months of the occurrence of the alleged unfair practice, except as otherwise provided in § 805.12 of this chapter. The charge shall contain a clear and concise statement of the facts constituting the alleged unfair practice, including the time and place of occurrence of the particular acts. The alleged unfair practice shall be investigated by the parties involved and informal attempts to resolve the matter shall be made by the parties. If informal attempts are unsuccessful in disposing of the matter within thirty (30) days, a party may file a complaint requesting the Commission to issue a decision in the matter: *Provided, however*, That if a final decision by the respondent is served on the charging party, the charging party may file a complaint immediately thereafter but in no event later than sixty (60) days from the date of service of the respondent's written final decision on the charging party: *Provided, further*, That to be considered timely a complaint to the Commission shall be filed within nine (9) months of the occurrence of the alleged unfair practice or within sixty (60) days of the service of the respondent's written final decision on the charging party.

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charging party, whichever is the shorter period of time.

(b) The thirty (30) day charge period as required under paragraph (a) of this section shall not be applicable to allegations of violations of section 13(b)(4) of the order. In such a situation, a complaint may be filed immediately with the Commission.

(c) In complaints alleging violations of section 13(b)(4), the Commission shall conduct a priority investigation.

§ 803.3 Contents of the complaint and supporting documents.

(a) A complaint alleging a violation of section 13 of the order shall contain the following:

(1) The name, address, and telephone number of the employee, foreign affairs agency, or organization making the complaint (hereinafter referred to as the complainant);

(2) The name, address, and telephone number of the foreign affairs agency or organization against whom the complaint is made;

(3) A clear and concise statement of the facts constituting the alleged unfair practice, including the time and place of occurrence of the particular acts, the names and addresses of the individuals involved, and a statement of the section and subsection of the order alleged to have been violated;

(4) A statement of any other procedure invoked involving the subject matter of the complaint and the results, if any;

(5) A declaration by the person signing the complaint, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of his or her knowledge and belief.

(b) The entire report of investigation by the complainant, pursuant to § 803.2, including, among other things, the pre-complaint charge, copies of relevant correspondence, other written materials, statements of witnesses, summaries of meetings and discussions, offers of settlement by the respondent and settlement proposals advanced by the complainant, shall be filed with the complaint.

§ 803.4 Filing and service of copies.

(a) An original and four copies of a complaint and two (2) copies of the entire report of investigation shall be filed with the Commission.

(b) Simultaneously with the filing of a complaint and the complainant's report of investigation, copies of each shall be served by the complainant on the respondent, and a written statement of such service shall be filed with the Commission.

§ 803.5 Investigation of the complaint; stipulation of facts.

(a) Within fifteen (15) days following the service of a copy of the complaint, unless an extension of time has been granted by the Commission, the respondent shall file a response thereto, including the entire report of its investigation, raising any matter which is relevant to

the complaint. The response shall be filed with the Commission and copies thereof shall be served simultaneously on the other parties. Upon the filing of a complaint the Commission shall cause such additional investigation to be made as it deems necessary.

(b) The parties may submit to the Commission a stipulation of facts and their request for a decision by the Commission without a hearing.

(c) The complainant shall bear the burden of proof at all stages of the proceedings regarding matters alleged in its complaint.

§ 803.6 Preliminary action by the Commission.

(a) The Commission shall take appropriate measures which may consist of the approval of a withdrawal request or dismissal of the complaint, approval of a satisfactory offer of settlement made any time prior to the close of a hearing, if any, approval of a stipulation of facts pursuant to § 803.5(b), or the issuance of a notice of hearing.

(b) In cases involving complaints alleging a violation of section 13(b)(4) of the order, if the Commission determines, based upon the evidence adduced, that a reasonable basis for a complaint exists and no satisfactory offer of settlement has been made, it shall issue an expedited notice of hearing. The complainant shall bear the burden of proof at the hearing.

(c) Cases involving complaints alleging violations of section 13(a)(2) of the order shall be given priority over all other unfair practice cases except cases of like character and cases under paragraph (b) of this section.

§ 803.7 Withdrawal or dismissal of complaint.

(a) If the Commission determines that the complaint has not been timely filed, that a reasonable basis for the complaint has not been established, that a satisfactory offer of settlement has been made, or for other appropriate reasons, it may request the complainant to withdraw the complaint and in the absence of such withdrawal within a reasonable time, it may dismiss the complaint.

(b) If the Commission dismisses the complaint, it shall furnish the complainant with a written statement of the grounds for dismissal, sending a copy of the statement to the respondent. If the dismissal is based on approval of an offer of settlement which is satisfactory to the Commission, such statement shall set forth the terms of settlement and the implementation thereof.

§ 803.8 Notice of hearing.

The Commission may cause a notice of hearing to be issued if, after the filing of a complaint, it finds, based on the allegations and the reports of investigation by the parties and any additional investigation, that there is a reasonable basis for the complaint and that no satisfactory offer of settlement has been made.

§ 803.9 Contents of the notice of hearing; attachments.

(a) The notice of hearing shall include:

(1) A statement of time and place of the hearing which shall be not less than ten (10) days after service of the notice of hearing, except in extraordinary circumstances;

(2) A statement of the nature of hearing;

(3) A statement of the authority and jurisdiction under which the hearing is to be held;

(4) A reference to the particular sections of the order and regulations involved.

(b) Attached to the notice of hearing shall be a copy of the complaint and the respondent's answer.

(c) The reports of investigation by the parties referred to in § 803.3 shall be furnished to the Hearing Examiner; however, the reports of investigation will not be deemed as evidence, and any party wishing to rely upon anything contained therein must make an appropriate submission at the hearing.

§ 803.10 Conduct of hearing.

(a) The Commission in its sole discretion and on its own motion, may sit en banc and conduct the hearing. Where the Commission hears the case sitting en banc, it will issue a decision on the record in the case after the close of the hearing. The Commission in such cases will have all the powers of a Hearing Examiner and will advise the parties (notwithstanding § 803.21) whether briefs will be permitted. Where the Commission has decided to hear the case en banc the rules concerning the filing of exceptions to Hearing Examiners' reports and recommendations do not apply to its decisions. If the Commission does not elect to sit en banc, it shall inform the Chief Hearing Examiner, who will designate a Hearing Examiner to conduct the hearing.

(b) Hearings shall be open to the public unless otherwise ordered by the Hearing Examiner for good cause, stated in writing and made a part of the record. When requested to do so by the head of the foreign affairs agency, the Commission shall direct that the hearing be conducted, in whole or in part, as a closed hearing, in order to prevent the disclosure of information that would be injurious to the national security or foreign policy.

(c) An official reporter shall make the only official transcript of such proceedings. Copies of the official transcript will not be provided to the parties but may be purchased by arrangement with the official reporter or arrangements may be made with the Commission to examine the transcript during normal working hours.

§ 803.11 Intervention.

Any person desiring to intervene in any proceeding shall file a motion in writing with the Chief Hearing Examiner or the designated Hearing Examiner, or, if made at the hearing, may move orally on the record, stating the

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grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the Commission; during the hearing such motion shall be made to the Hearing Examiner. An original and two copies of written motions shall be filed. Simultaneously upon filing such motion, the moving party shall serve a copy thereof on the other parties. The Commission shall rule upon all such motions filed prior to the hearing, and shall cause a copy of such rulings to be furnished to the other parties, or may refer the motion to the Hearing Examiner for ruling. The Hearing Examiner shall rule upon all such motions made at the hearing or referred to the Hearing Examiner by the Commission. When the Hearing Examiner rules, before the hearing, on a motion referred to the Hearing Examiner by the Commission, he shall furnish copies of such ruling to the parties. The Commission or Hearing Examiner, as the case may be, may permit intervention in person or by counsel or other representative to such extent and upon such terms as may be deemed proper.

§ 303.12 Rights of parties.

Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to examine and cross-examine witnesses, and to introduce into the record documentary or other relevant evidence, except that the participation of any party shall be limited to the extent prescribed by the Hearing Examiner. Two copies of documentary evidence shall be submitted and a copy furnished to each of the other parties. Stipulations of fact may be introduced in evidence with respect to any issue.

§ 303.13 Rules of evidence.

The technical rules of evidence do not apply. Any evidence may be received, except that a Hearing Examiner may exclude any evidence or offer of proof which is immaterial, irrelevant, unduly repetitious, or customarily privileged. Every party shall have a right to present its case by oral and documentary evidence and to submit rebuttal evidence.

§ 303.14 Burden of proof.

A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.

§ 303.15 Duties and powers of the Hearing Examiner.

It shall be the duty of the Hearing Examiner to inquire fully into the facts as they relate to the matter before him or her. Upon assignment to the Hearing Examiner and before transfer of the case to the Commission, the Hearing Examiner shall have the authority to:

- (a) Grant requests for appearance of witnesses or production of documents;
- (b) Rule upon offers of proof and receive relevant evidence;
- (c) Take or cause deposition to be taken whenever the ends of justice would be served thereby;

(d) Limit lines of questioning or testimony which are immaterial, irrelevant, customarily privileged, or unduly repetitious;

(e) Regulate the course of the hearing and, if appropriate, exclude from the hearing persons who engage in misconduct and strike all related testimony of witnesses refusing to answer any questions ruled to be proper;

(f) Hold conferences for the settlement or simplification of the issues by consent of the parties or upon his or her own motion and, where appropriate, transmit to the Commission offers of settlement by a party or parties;

(g) Dispose of procedural requests, motions, or similar matters which shall be made part of the record of the proceeding, including motions referred to the Chief Hearing Examiner or to the designated Hearing Examiner by the Commission and motions to amend pleadings, also to recommend dismissal of cases or portions thereof, and to order hearings reopened prior to issuance of the Hearing Examiner's report and recommendations;

(h) Examine and cross-examine witnesses and to introduce into the record documentary or other evidence;

(i) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(j) Continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice;

(k) Prepare, serve, and submit his or her report and recommendations pursuant to § 303.22;

(l) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial or official notice: *Provided*, That the parties shall be given adequate notice, at the hearing or by reference in the Hearing Examiner's decision of the matters so noticed, and shall be given adequate opportunity to show the contrary;

(m) Correct or approve proposed corrections of the official transcript when deemed necessary;

(n) Take any other action necessary under the foregoing and not prohibited by these regulations.

§ 303.16 Unavailability of Hearing Examiners.

In the event of the Hearing Examiner designated to conduct the hearing becomes unavailable, the Chief Hearing Examiner shall designate another Hearing Examiner for the purpose of further hearing or issuance of a report and recommendations on the record as made, or both.

§ 303.17 Objection to conduct of hearing.

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing accompanied by a short statement of the

grounds for such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing. Such objection shall not stay the conduct of the hearing.

(b) Automatic exceptions will be allowed to all adverse rulings. Rulings by the Hearing Examiner shall not be appealed prior to the transfer of the case to the Commission, but shall be considered by the Commission only upon the filing of exceptions to the Hearing Examiner's report and recommendations in accordance with § 303.22.

§ 303.18 Motions before or after a hearing.

(a) All motions made before a hearing shall be made in writing to the Commission. All motions made after the hearing but prior to the transfer of the case to the Commission shall be filed with the Hearing Examiner. All motions made after the transfer of the case to the Commission, except motions to correct the record under § 303.15(m) shall be made in writing to the Commission. The moving party shall serve simultaneously a copy of all motion papers on all other parties. A statement of service shall accompany the motion. Answering affidavits, if any, must be served on all parties and the originals thereof, together with two (2) copies and a statement of service, shall be filed with the Commission before the hearing, with the Hearing Examiner after the hearing begins and before transfer of the case to the Commission and with the Commission after transfer of the case to it; within five (5) days after service of the moving papers unless it is otherwise directed.

(b) The Commission may rule upon all motions filed with it before the hearing, causing a copy of such ruling to be served on the parties, or it may refer such motions to the Chief Hearing Examiner or to the Hearing Examiner if one has been designated by the Chief Hearing Examiner. The Hearing Examiner may rule upon all motions referred to him or her prior to the hearing by the Commission or by the Chief Hearing Examiner and may rule upon all motions filed after the beginning of the hearing and before transfer of the case to the Commission. Such motions may be ruled upon by the Chief Hearing Examiner in the absence of the Hearing Examiner.

§ 303.19 Waiver of objections.

Any objection not made before a Hearing Examiner shall be deemed waived.

§ 303.20 Oral argument at the hearing.

Any party shall be entitled, upon request, to a reasonable period prior to the close of the hearing for oral argument, which shall be included in the official transcript of the hearing.

§ 303.21 Filing of brief.

Any party desiring to submit a brief to the Hearing Examiner shall file the original and two (2) copies within fourteen (14) days after the close of the hearing; *Provided, however*, That prior to the close of the hearing and for good cause, the Hearing Examiner may grant

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a reasonable extension of time. Copies thereof shall be served simultaneously on all other parties to the proceeding, and a statement of such service shall be filed with the Hearing Examiner. Requests for additional time in which to file a brief under authority of this section not addressed to the Hearing Examiner during the hearing shall be made to the Chief Hearing Examiner, in writing at least three (3) days before the briefs are due and copies shall be served simultaneously on the other parties. A statement of such service shall be furnished. No reply brief may be filed except by special permission of the Hearing Examiner.

§ 303.22 Submission of the Hearing Examiner's report and recommendations to the Commission; exceptions.

(a) After the close of the hearing, and the receipt of briefs, if any, the Hearing Examiner shall prepare a report and recommendations expeditiously. The report and recommendations shall contain findings of fact, conclusions, and the reasons or basis therefor including credibility determinations, and recommendations as to the disposition of the case including, where appropriate, the remedial action to be taken and notices to be posted.

(b) The Hearing Examiner shall cause the report and recommendations to be served promptly on all parties to the proceeding. Thereafter, the Hearing Examiner shall transfer the case to the Commission, including the report and recommendations and the record. The record shall include the complaint, notice of hearing, service sheet, motions, rulings, orders, official transcript of the hearing, stipulations, objections, depositions, exhibits, documentary evidence, and any briefs or other documents submitted by the parties.

(c) An original and two (2) copies of any exceptions to the Hearing Examiner's report and recommendations may be filed by any party with the Commission within ten (10) days after service of the report and recommendations: *Provided, however*, That the Commission may for good cause shown extend the time for filing such exceptions. Requests for additional time in which to file exceptions shall be in writing; copies thereof shall be served simultaneously on the other parties and a statement of such service shall be furnished to the Commission. Requests for extension of time must be received no later than three (3) days before the date the exceptions are due. Copies of such exceptions and any supporting briefs shall be served simultaneously on all other parties, and a statement of such service shall be furnished to the Commission.

§ 303.23 Contents of exceptions to Hearing Examiner's report and recommendations.

(a) Exceptions to a Hearing Examiner's report and recommendations shall:

- (1) Set forth specifically the questions upon which exceptions are taken;
- (2) Identify that part of the Hearing Examiner's report and recommendations to which objection is made;

(3) Designate by precise citation of page the portions of the record relied on, state the grounds for the exceptions, and include the citation of authorities unless set forth in a supporting brief.

(b) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

§ 303.24 Briefs in support of exceptions.

(a) Any brief in support of exceptions shall contain only matters included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A concise statement of the case containing all that is material to the consideration of the questions presented;

(2) A specification of the questions involved and to be argued;

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

(b) Answering briefs to the exceptions and cross-exceptions and supporting briefs may be filed at the discretion of the Commission.

§ 303.25 Action by the Commission.

(a) After considering the Hearing Examiner's report and recommendations, the record, and any exceptions filed, the Commission shall issue its decision affirming or reversing the Hearing Examiner, in whole or in part, or making such other disposition of the matter as it deems appropriate: *Provided, however*, That unless exceptions are filed which are timely and in accordance with § 303.23, the Commission may, at its discretion, adopt without discussion the report and recommendations of the Hearing Examiner, in which event the findings, conclusions, and recommendations of the Hearing Examiner, as contained in his report and recommendations shall, upon appropriate notice to the parties, automatically become the decision of the Commission.

(b) Upon finding a violation of the order the Commission may order the respondent to cease and desist from conduct violative of the order and may require the respondent to take such affirmative corrective action as it deems appropriate to effectuate the policies of the order.

(c) Upon finding no violation of the order, the Commission shall dismiss the complaint.

§ 303.26 Compliance with decisions and orders of the Commission.

When remedial action is ordered, the respondent shall report to the Commission within a specified period that the required remedial action has been effected. When the Commission finds that the required remedial action has not been effected, it may take such action as it deems appropriate including referring

the matter to the Board of the Foreign Service.

PART 304—STANDARDS OF CONDUCT

- Sec.
304.1 Substantive requirements concerning standards of conduct.
304.2 Proceedings for enforcing standards of conduct.

AUTHORITY: The provisions of this Part 304 issued under secs. 5 and 12, E.O. 11636, 36 F.R. 24901.

§ 304.1 Substantive requirements concerning standards of conduct.

(a) The provisions of Subpart A of 29 CFR Part 204 "Substantive Requirements Concerning Standards of Conduct" are hereby incorporated by reference and shall be applicable to all organizations, members thereof, and other persons subject to the order, except that all duties, responsibilities, and authority directly allocated to the Assistant Secretary for Labor-Management Relations shall under the regulations in this part be assumed by the Commission.

(b) The reference to Executive Order 11491 in § 204.2(a) (5) (b) of Title 29 shall be deemed to read Executive Order 11636.

§ 304.2 Proceedings for enforcing standards of conduct.

(a) The provisions of Subpart B of 29 CFR Part 204 "Proceedings for Enforcing Standards of Conduct" are hereby incorporated by reference and shall be applicable to all organizations, members thereof, and other persons subject to the order, with the following exceptions: (1) Those portions of Subpart B which provide for reports by the Area Administrator to the Regional Administrator or by the Regional Administrator to the Director shall not be applicable; (2) all functions which in Subpart B are performed by an Area Administrator or Regional Administrator shall be performed by the Director or his agents; (3) 29 CFR 204.85 is amended to substitute a comma for the period at the end thereof, and to add the phrase "or if held outside of such geographic jurisdiction at an appropriate location by arrangement with the Commission"; (4) the reference to Executive Order 11491 in 29 CFR 204.64 shall be deemed to read Executive Order 11636; (5) 29 CFR 203.25(c) and 204.91(c) shall be deleted and all other references to the Council shall not be applicable; (6) the duties, responsibilities, and authority allocated to the Assistant Secretary under Subpart B shall under these regulations be assumed by the Commission; and (7) 29 CFR 204.93 shall be deleted.

PART 305—CONSULTATION PROCEEDINGS

- Sec.
305.1 Priority of consideration.
305.2 Who may file an application.
305.3 Action to be taken before filing an application with the Commission.
305.4 Contents of application and attachments.
305.5 Filing and service of copies.

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- 805.6 Investigation of the application.
- 805.7 Action by the Commission.
- 805.8 Notice of hearing.
- 805.9 Contents of notice of hearing; attachments.
- 805.10 Hearing and posthearing procedures.
- 805.11 Compliance with a decision of the Commission.
- 805.12 Subsequent unfair practice charges.

Authority: The provisions of this Part 805 issued under sec. 5, E.O. 11636, 36 F.R. 24901.

§ 805.1 Priority of consideration.

Because of their importance to the effectuation of the purposes of the order, proceedings to determine whether an obligation to consult exists with respect to particular issues will ordinarily be given priority over all other matters before the Commission. Decisions in such cases will be rendered as expeditiously as the orderly conduct of proceedings will permit.

§ 805.2 Who may file an application.

An application for a decision by the Commission concerning a question as to whether or not an obligation to consult exists under the order with respect to particular issues may be filed by a foreign affairs agency or a certified organization.

§ 805.3 Action to be taken before filing an application with the Commission.

Any application for a decision by the Commission as to whether or not an obligation to consult exists under the order with respect to particular issues, must be filed with the Commission by the party seeking consultation within thirty (30) days after an alleged denial of an obligation to consult by the other party.

§ 805.4 Contents of application and attachments.

(a) An application filed under this section shall contain the following:

- (1) The name of the foreign affairs agency involved, its address, telephone number, and the person to contact and title, if known;
- (2) The name, address, and telephone number of the certified organization;
- (3) A clear and concise statement of the issues in dispute;
- (4) A statement of any other procedures invoked involving the subject matter of the dispute and the results, if any;
- (5) A declaration by the person signing the application, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of that person's knowledge and belief, and the signature of the applicant or the applicant's representative, including title, address, and telephone number.

(b) The applicant shall furnish with the application, two (2) copies of the following: (1) A statement of any other relevant facts; and (2) all correspondence between the parties relating to the disputed issue(s), and may, in addition, file a memorandum or brief in support of its position.

§ 805.5 Filing and service of copies.

(a) An original and four (4) copies of an application, including two (2) copies of all attachments, shall be filed with the Commission.

(b) Simultaneously with the filing of an application, a copy of the application and all materials submitted therewith shall be served on the other party, and a written statement of such service shall be filed with the Commission.

§ 805.6 Investigation of the application.

(a) After the application has been filed, the other party shall file two (2) copies of a response with the Commission within fifteen (15) days following the service of a copy of the application, unless an extension of time has been granted by the Commission. The other party may file with its response a memorandum or brief in support of its position.

(b) The response shall cover any matter which is relevant to the application and shall include any supporting evidence on the issue(s) raised by the application and the attachments thereto. A copy of such response and all material submitted therewith shall be served simultaneously on the other party and a written statement of such service shall be filed with the Commission.

(c) Upon the filing of an application, the Commission shall cause such additional investigation to be made as it deems necessary.

(d) The parties shall, whenever possible, submit to the Commission a stipulation of facts together with their request for a decision by the Commission without a hearing.

§ 805.7 Action by the Commission.

(a) The Commission shall take appropriate measures which may consist of:

- (1) Approval of a request for withdrawal of the application; or
- (2) Dismissal of the application if it determines that the application has not been timely filed or otherwise is not actionable; or
- (3) Issuance of a report and findings on the questions involved, on the basis of the material before it, including information obtained from oral argument, if requested by the Commission.

(b) The Commission may, in addition to, or in lieu of, the actions described in paragraph (a) of this section, issue a notice of hearing as provided by § 805.8.

§ 805.8 Notice of hearing.

The Commission may cause a notice of hearing to be issued providing for a hearing before a Hearing Examiner if, at any time after the filing of an application, it finds that the issues cannot otherwise be resolved.

§ 805.9 Contents of notice of hearing; attachments.

(a) The notice of hearing shall include:

- (1) A statement of the time and place of the hearing, which shall be not less than ten (10) days after service of the notice of hearing, except in extraordinary circumstances;

(2) A statement of the nature of the hearing;

(3) A statement of the authority and jurisdiction under which the hearing is to be held;

(4) A reference to the particular sections of the order and regulations involved.

(b) Attached to the notice of hearing shall be a copy of the application and attachments and the response(s) thereto.

(c) The attachments to the application referred to in § 805.4(b) and the responses thereto shall be furnished to the Hearing Examiner, but will not be deemed as evidence, and any party wishing to rely upon anything contained therein must make an appropriate submission at the hearing.

§ 805.10 Hearing and posthearing procedures.

Hearing procedures shall be in accordance with §§ 803.10 through 803.20 with the exception of § 803.14 of this chapter. There shall be no burden of proof in hearings conducted under this part. The procedures after the close of the hearing shall be in accordance with §§ 803.18 through 803.24 with the exception of §§ 803.19 and 803.20 of this chapter. After considering the Hearing Examiner's report and recommendations and the record and any exceptions filed thereto; the Commission shall issue its decision affirming or reversing the Hearing Examiner, in whole or in part, or make any other disposition of the matter it deems appropriate.

§ 805.11 Compliance with a decision of the Commission.

(a) When a decision is made that an obligation to consult exists with respect to a particular issue or issues, the parties shall report to the Commission, within a specified period, that the required consultation is being undertaken.

(b) When the Commission finds that the consultation required pursuant to a decision of the Commission has not been effected, the Commission may refer the matter to the Board of the Foreign Service, or take such other action as appropriate.

§ 805.12 Subsequent unfair practice charges.

(a) Notwithstanding the time limitation provisions of § 803.2 of this chapter, an applicant who has received a final decision on his application from the Commission may file a charge of an alleged unfair practice under section 13 of the order which is based on the same factual situation which gave rise to the application. Any such charge must be filed within thirty (30) days of the issuance of the final decision referred to above.

(b) The procedures of Part 803 of this chapter shall apply to a charge filed following the issuance of the final decision referred to in paragraph (a) of this section, except that the charging party must file any complaint within sixty (60) days from the date of service of the respondent's written final decision on the charging party, or within ninety

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(3) days of the date the charge was filed, whichever is the shorter period of time.

PART 806—MISCELLANEOUS

- Sec.
806.1 Computation of time for filing papers.
806.2 Additional time after service by mail.
806.3 Documents in a proceeding.
806.4 Service of pleading and other papers under this chapter.
806.5 Consolidation of cases.
806.6 Request for appearance of witnesses and production of documents at hearing.
806.7 Rules to be construed liberally.
806.8 Petitions for amendment of regulations.

Authority: The provisions of this part 806 issued under secs. 5, 12, E.O. 11656, 36 F.R. 24901.

§ 806.1 Computation of time for filing papers.

In computing any period of time prescribed by or allowed by these regulations, the date of the act, event, or default after which the designated period of time begins to run, shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a Federal legal holiday. When the period of time prescribed, or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computations. When these regulations require the filing of any paper, such document must be received by the Commission or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any; for such filing or extension of time that may have been granted.

§ 806.2 Additional time after service by mail.

Whenever a party has the right or is required to do some act pursuant to these regulations within a prescribed period after required service of a notice or other paper upon him and the notice or paper is served on him by mail, three (3) days shall be added to the prescribed period: *Provided, however,* That three (3) days shall not be added if any extension of time may have been granted.

§ 806.3 Documents in a proceeding.

(a) *Title.* Documents in any proceeding under these regulations including correspondence shall show the title of the proceeding and the case number, if any.

(b) *Number of copies; form.* Except as provided in these regulations any documents or papers shall be filed with four (4) copies in addition to the original. All matters filed shall be printed, typed, or otherwise legibly duplicated; carbon copies of typewritten matter will be accepted if they are clearly legible.

(c) *Signature.* The original of each document required to be filed under these regulations shall be signed by the party or by an attorney or representative of record for the party, or by an officer of the party, and shall contain the address and telephone number of the person signing it.

§ 806.4 Service of pleading and other papers under this chapter.

(a) *Method of service.* Notices of hearing, decisions, orders, and other papers may be served personally or by registered or certified mail or by telegraph.

(b) *Upon whom served.* All papers, except as herein otherwise provided, shall be served upon all counsel of record and upon parties not represented by counsel or by their agents designated by them or by law and upon the Commission, or its designated officer, or agent or examiner, where appropriate. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

(c) *Statement of service.* The party or person serving the papers or process shall submit simultaneously to the Commission or other designated representative, or to the individual conducting the proceeding, a written statement of such service; failure to file a statement of service shall not affect the validity of the service. Proof of service shall be required only if subsequent to the receipt of a statement of service a question is raised with respect to proper service.

§ 806.5 Consolidation of cases.

In any matter arising pursuant to these regulations, whenever it appears necessary in order to effectuate the purposes of the order or to avoid unnecessary costs or delays, the Commission may consolidate cases.

§ 806.6 Request for appearance of witnesses and production of documents at hearing.

(a) The Commission, Hearing Officers, or Hearing Examiners, as appropriate, upon their own motion, or upon motion of any parties to a proceeding, may issue a request for appearance of witnesses or request for production of documents at a hearing held pursuant to Parts 802, 803, and 805 of this chapter. When it is impracticable for a witness to appear personally at a hearing, the Commission, Hearing Officer, or Hearing Examiner, as appropriate, may provide for the taking of testimony by deposition in response to written or oral interrogatories.

(b) A party's motion to the Commission shall be in writing and filed with the Commission prior to the opening of a hearing or with a Hearing Officer or Hearing Examiner during the hearing, and shall name and identify the witness(es) or document(s) sought, or both, and state the reasons therefor. Simultaneously with the filing of a request

with the Commission, copies shall be served on the other parties and a written statement of such service shall be filed with the Commission.

(c) Within five (5) days after service of the motion, a party may file its objection to the motion with the Commission and state its reasons therefor. Simultaneously with the filing of the objection with the Commission, copies shall be served on the other parties and a written statement of such service shall be filed with the Commission. The Commission may rule upon the motion or refer it to the Hearing Officer or Hearing Examiner for an appropriate ruling.

(d) Objections to a motion referred to or filed with a Hearing Officer or Hearing Examiner may be stated orally on the record.

(e) A motion shall be granted by the Commission, Hearing Officer, or Hearing Examiner, after careful consideration of any objections and upon determination that the testimony or documents appear(s) to be necessary to the matters under investigation and describe(s) with sufficient particularity the documents sought. Service of an approved request for appearance of witnesses or request for production of documents is the responsibility of the requesting party. Upon the failure of any party, or officer, or official, of any party to comply with such request(s), the Commission, Hearing Officer, or the Hearing Examiner, may disregard all related evidence offered by the party failing to comply or take such other action as may be appropriate.

(f) A denial of a motion shall be explained fully and it shall become a part of the hearing record.

§ 806.7 Rules to be construed liberally.

(a) The regulations in this chapter may be construed liberally to effectuate the purposes and provisions of the order.

(b) When an act is required or allowed to be done at or within a specified time, the Commission may at any time order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the order.

§ 806.8 Petitions for amendment of regulations.

Any interested person may petition the Commission in writing for amendments to any portion of these regulations. Such petition shall identify the portion of the regulations involved and provide the specific language of the proposed amendment together with a statement of grounds in support of such petition.

Dated at Washington, D.C., this 15th day of February 1972.

DAVID P. TAYLOR,
Chairman, Employee-Management
Relations Commission.

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